Supreme Court, U.S.
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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM 2000

TOM LANIER, individually and doing business as J. T. LANIER AGENCY,

Petitioner,

v.

OLD REPUBLIC INSURANCE COMPANY and OLD REPUBLIC UNION INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether an arbitration decision entered on claims judicially ordered to be arbitrated pursuant to the Federal Arbitration Act is *res judicata* as to non-arbitral claims judicially reserved for trial, thereby prohibiting Petitioner from even presenting some of his legal claims.

II. Whether eliminating Petitioner's remedy while his case is pending violates his right to due process guaranteed by the Fourteenth Amendment.

III. Whether intentional torts arising outside the confines of a contract, must be arbitrated under the Federal Arbitration Act.

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	J. Fairley McDonald, III
Petitioner's Counsel	William J. Baxley Charles A. Dauphin Donald R. James, Jr.
Respondents	Old Republic Insurance Company Old Republic Union Insurance Company
Trial Judge	Hon. William R. Gordon Retired Circuit Judge Montgomery County, Alabama 15th Judicial Circuit
Petitioner	Tom Lanier, individually J. T. Lanier Agency
Supreme Court of Alabama	Hon. Roy Moore Hon. Bernard Harwood Hon. J. Gorman Houston Hon. Lynn Stuart Hon. Harold See Hon. Champ Lyons, Jr. Hon. Jean Brown Hon. Douglas Johnstone Hon. Tom Woodall

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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PETITION FOR WRIT OF CERTIORARI

Tom Lanier respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama reported as *Old Republic Insurance Company and Old Republic Union Insurance Company v. Tom Lanier, individually, and J. T. Lanier Agency,* and set forth in the attached Appendix hereto as A-1.

OPINIONS BELOW

The Circuit Court for Montgomery County, Alabama issued an order compelling arbitration of certain claims and denying arbitration as to other claims. In Respondent's appeal of that decision, the Supreme Court of Alabama, held that claims for fraud in the inducement and breach of contract were covered by arbitration provisions and subject to arbitration under the Federal Arbitration Act but a claim of conversion of client information was not covered by the FAA. *Old Republic Insurance Co. v. Lanier,* 644 So.2d 1258 (Ala. 1994). *("Lanier I")* Upon remand, the trial court ordered all claims be arbitrated except the conversion claim and a claim for intentional interference with business relationships which was retained for trial. An arbitration was subsequently held and the decision was entered as a judgment by the United States District Court for the Middle District of Alabama. *Lanier v. Old Republic Ins. Co.,* 936 F.Supp. 839 (M.D. Ala. 1996). A trial was held on the two remaining claims and a jury returned a verdict for the Petitioner on his intentional interference with prospective business relations, the restated conversion claim, awarding economic damages of $1,580,000.00 and punitive damages of $15,000,000.00. The jury also found in Petitioner's favor on his claim for intentional interference with contractual relationships, which involved interference with the relationship between Petitioner and his sub-agent,

awarding $1,360,000.00 in economic damages and $10,000,000.00 in punitive damages. The Respondent's post trial motions were denied by operation of law and an appeal was taken to the Alabama Supreme Court. The Alabama Supreme Court reversed the jury award holding that the decision by the arbitration panel was *res judicata* as to the issues tried to the court below. A petition for rehearing was filed by Petitioner which was denied on March 2, 2001.

JURISDICTION

Petitioner's application for rehearing was denied by the Alabama Supreme Court on March 2, 2001. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Nature of Case, Course of Proceedings, and Disposition.

On November 12, 1992, Tom Lanier, individually and d/b/a J. T. Lanier & Associates ("Lanier") and Chattawood Insurance Company, Inc. filed suit against Old Republic Insurance Company and Capital Fire & Marine Insurance Company, now called Old Republic Union Insurance Company (the Old Republic Companies are collectively referred to as "Old Republic") claiming among other things fraud in the inducement of agency contracts between Lanier and Old Republic in which Old Republic represented that Lanier would be an exclusive agent, breach of the agency agreements, and conversion of Lanier's clients and information pertaining to those client accounts (subsequently designated "expirations.") Old Republic moved to stay the action and to compel arbitration pursuant to the Federal Arbitration

Act. The trial court granted the motion to stay, ordered arbitration as to the breach of contract claims but denied the motion as to the fraud and conversion counts. Old Republic appealed the arbitration issues to the Alabama Supreme Court, which held the arbitration issues were governed by the Federal Arbitration Act, the fraud and breach of contract claims related to the interpretation and performance of the contracts between the parties and were subject to arbitration, but the conversion and interference of business relations claims did not relate to the interpretation and performance of the contracts and were not subject to arbitration. *Old Republic Insurance Co. v. Lanier,* 644 So.2d 1258 (Ala. 1994). *("Lanier I")* Specifically, the court stated: "We hold that the claim of conversion and interference with business relationships is not subject to the FAA." *Lanier I* at 1258.

On remand, the trial court entered an order reserving for trial Lanier's claims for conversion of expirations and intentional interference with business relationships based upon Lanier's relationship with his sub-agent, but ordered all other counts to arbitration. (CR. 497, 498). Old Republic filed a motion to reconsider the trial court's order denying arbitration of the intentional interference with business relations claim pertaining to Lanier's sub-agent, and the trial court again denied the motion. (CR. 499-504, 577-592).

The claims to be tried were stayed while the parties proceeded to arbitration. On July 14, 1995 the arbitration panel entered a judgment in favor of Lanier and against Old Republic "in the amount of $400,000.00 for breach of contract." All other claims of Lanier pending before the panel were denied. (CR 680).

After arbitration, Old Republic filed a motion for summary judgment with the trial court contending, among other things, that the tort of conversion did not apply to the interference with Lanier's expirations because such

interference or control was over an intangible property, which was not subject to the tort of conversion. Lanier disputed Old Republic's contention, but also requested leave to file an amended complaint. (CR. 1755-1757). The court granted Old Republic's summary judgment as to the conversion of the expirations but allowed an amendment seeking damages for the misuse of the expirations under a claim for intentional interference with prospective business relationships. (CR 1860-1861).

On September 18, 1997 a jury awarded Lanier compensatory damages and punitive damages totaling $27,940,000. The jury refused to award Lanier any damages for mental anguish. (CR. 1906). Old Republic subsequently filed post-trial motions, including a request for remittitur, which were denied.

Old Republic then appealed to the Alabama Supreme Court, which on May 26, 2000 entered its decision reversing the jury verdict and holding that the arbitration order was *res judicata* as to the claims subsequently presented in the trial court. Lanier filed a petition for rehearing, which was denied on March 2, 2001.

II. Statement of Facts with References to the Record

Lanier owned and managed an insurance agency, J. T. Lanier & Associates, which marketed workers' compensation to logging operations in the southeast. Lanier developed a specific insurance program to market workers' compensation to particular logging operations that used machinery to harvest timber as opposed to chainsaw or manual operations, *i.e.,* mechanized loggers. (R. 14, 15). In 1985, Lanier approached Old Republic with his marketing plan. Over a period of eighteen months, Old Republic investigated the program and finally agreed to underwrite the program if Lanier formed an insurance company to assume part of the risk. (R. 28) Lanier and

his father invested $1,250,000.00 to form Chattawood Insurance Company, which entered into a quota share reinsurance agreement with Old Republic whereby Chattawood shared twenty-five percent of the risk of the program. (R. 820, 821; Pl. Ex. 2) Lanier also entered into agency contracts with Old Republic and Old Republic Union Insurance Company and was told that he was the exclusive agent for his program responsible for marketing and selling. (R. 29-31, 36) Old Republic was to perform the underwriting. (R. 36)

The business actually lost money in its early years due to the cost of adding producers, but began to sustain substantial growth through 1990. (R. 828) At that time, Lanier approached two agents in the State of Florida, Richard Chancy and Jeffery "Ric" Stoutamire, who owned Chancy-Stoutamire, Inc., an insurance agency which also targeted the logging industry. Chancy-Stoutamire, Inc. joined Lanier's program as his sub-agent, began marketing Old Republic policies through Lanier's agency, and agreed to make an investment in Chattawood in return for receiving the same ten percent commission Lanier received . (R. 828, 296, 830; Pl. Ex. 19)

In 1992, after the program had grown to such an extent that Old Republic told Lanier in December, 1991 that it was worried that it would have to cap the program, Old Republic began writing Lanier with various complaints and demanded a larger investment be made in Chattawood. (R. 113, 832, 117, 135) Lanier subsequently asked Chancy-Stoutamire to make the investment they had originally agreed to make. (R. 846)

Chancy then called Old Republic saying that he assumed Lanier could run him off as Lanier had told them he was the exclusive agent for the program and he was writing business as Lanier's sub-agent. (R. 390). Old Republic told Chancy that Lanier did not have an exclusive, asked Chancy to request in writing a direct contract with

Old Republic, and specifically told Chancy to put in the letter the reasons he was having difficulty with Lanier. (R. 412-413).

After a couple of weeks of letters, telephone calls and meetings, Old Republic appointed Chancy-Stoutamire as its direct agent on June 25, 1992. (R. 155). Old Republic then began making additional demands of Chattawood and Lanier. (Plf's Ex. 56; R. 175, 176, 177, Plf's Ex. 57, Plf's Ex. 60, Plf's Ex. 59, Plf's Ex. 61, Plf's Ex. 62, R. 179). In July, 1992 Lanier and Jim Mitchell, an insurance specialist Lanier had retained to advise him on insurance matters, conducted a conference call with the C.E.O. of Old Republic and its in-house counsel. In the conversation, the C.E.O. told Mitchell and Lanier:

> "I don't give a ____ about Alabama and I don't give a ____ about this logging business, and $10,000,000.00 doesn't mean a ____ to me, and I don't have time to with this. I am running the company here and ten million dollars is nothing."

(R. 766).

After the telephone conversation, Old Republic issued Lanier a notice of termination dated July 27, 1992, effective October 26, 1992, ninety days after the notice. (R. 868). On July 27, 1992, Old Republic also sent a letter to Chancy-Stoutamire giving it notice of termination effective October 26th. (R. 209). Chancy-Stoutamire, however, was never terminated, and their business was never interrupted. (R. 318). Instead, Old Republic immediately terminated Lanier and refused to accept any renewal business or new applications effective July 27, 1992. (R. 197). Old Republic subsequently changed its position and ultimately decided that it would accept new business and renewal accounts from Lanier through October 26, 1992. (R. 203).

The agency contract between Lanier and Old Republic stated Lanier owned the "expirations" after the agency agreement was terminated. (R. 226, 227). The term "expirations" references the information contained in the insurance files pertaining to the insureds. It includes policies, premiums, things insured, and all of the data about a given insured's relationship with an insurance agency and an insurance company. (R. 586). By owning the expirations, Lanier owned "whatever information was contained in the files[.]" (R. 587). Old Republic even admitted that it should not put on its books Lanier applications or former accounts of Lanier. (R. 237, 238). Yet, after the termination of Lanier, Old Republic accepted accounts of Lanier from Ricky Chancy (R. 397), did not place any restrictions on writing insurance for Lanier's former accounts (R. 454), distributed a loss history report which contained information about Lanier's insureds to other agents (R. 620-625), and renewed all the business that had been previously written through Lanier's agency by Chancy-Stoutamire without taking any new applications. (R. 318). Old Republic used Lanier's expiration information in the files to compete with Lanier after his termination and decreased the premiums charged former Lanier accounts. (R. 429, 434-437). The Alabama Insurance Department wrote Old Republic after Lanier was terminated inquiring as to the method Old Republic was pricing its policies because the method Old Republic continued to use was in violation of the Department's directive. (R. 557, 558). Old Republic then switched policies from Old Republic Union Insurance Company to Old Republic Insurance Company to try to avoid the state's directive on pricing in order to acquire Lanier's accounts after his termination through the use of the expiration information. (R. 554).

Dave Borden, a certified public accountant, testified that Lanier's agency suffered a total loss of $2,940,000 in

compensatory damages (R. 1048), the amount the jury awarded. The jury awarded an additional $25 million in punitive damages due to the intentional wrongful acts of Old Republic, only some of which have been referenced herein. (CR. 1906)

ARGUMENT

I. An arbitration decision entered on claims judicially ordered to be arbitrated pursuant to the Federal Arbitration Act has no res judicata effect upon claims reserved for judicial resolution.

Petitioner J. T. Lanier ("Lanier") followed the orders of the Alabama Supreme Court and the Montgomery County Circuit Court and presented claims covered by an arbitration agreement to an arbitration panel. He tried his remaining claims to a jury, again in accordance with the decision of the Alabama Supreme Court and the orders of the trial court. After obtaining a jury verdict, Lanier suffered a reversal of the judgment by the Alabama Supreme Court on the ground that the arbitration decision was res judicata as to his litigated claims.

In *Old Republic Insurance Company v. Lanier,* 644 So.2d 1258 (Ala. 1994) *("Lanier I"),* the Alabama Supreme Court held that "the policies, and provisions of the FAA govern all questions of the validity, interpretation, construction, and enforceability of the arbitration agreement." 644 So.2d 1258, 1259 (Ala. 1994) After reviewing the claims pursuant to the FAA, the Alabama Supreme Court held that Lanier's fraud in the inducement claim was "subject to arbitration under the FAA" (*Id.* 1263) but his claims for conversion and interference with business relationships were "not subject to the FAA." (*Id.* 1258) Specifically, the Alabama Supreme Court found:

> Count three, alleging that Old Republic and Old Republic Union converted Lanier's clients

> and client information for their own use, 'appears to raise issues largely distinct from the central conflict over the interpretation and performance of the [agreements themselves].' *(Citation omitted)* Therefore, the trial court correctly refused to submit count three to arbitration.
>
> For the foregoing reasons, the judgment of the circuit court is affirmed as to the conversion and interference with business relationships claim and reversed as to the fraud in the inducement claim, and the cause is remanded for proceedings consisted with this opinion."

Id. at 1263. On remand, the trial court ordered some claims to be arbitrated and the two other claims involving conversion of client information or expirations (which was subsequently amended to a claim for intentional interference with prospective business relationships) and the intentional interference with a business relationship between Lanier and his sub-agent, to be tried to a jury. (CR, 497, 577-585, 1894).

After an award on the judicially designated arbitration claims, the remaining claims were tried to a jury, and a verdict was returned for Lanier. After the denial of post-trial motions, Lanier's jury verdict, and the judgment thereon, was appealed to the Alabama Supreme Court.

In its opinion, the Alabama Supreme Court acknowledged that:

> *Lanier I* represented, of course, this Court's disposition of the arbitration issues. Specifically, we reversed the order of the trial court as to the fraud claim, but affirmed the order of the trial court as to the breach of contract claim. *Id.* at 1263. We also affirmed the trial court's order as to the conversion claims.

Opinion pp. 8, 9. Yet, the Alabama Supreme Court reversed the jury verdict, holding that the arbitration of the dispute was *res judicata* as to the subsequent litigation.

In its opinion, the Alabama Supreme Court conducted an analysis of the *res judicata* issue, set forth evidence which was presented both at the arbitration and the trial, noted the damages claimed by Lanier which were presented at the arbitration and at the trial, and concluded the claims Lanier litigated "were within the scope of submission" to arbitration. Opinion at p. 15. Significantly, the Alabama Supreme Court never held that these legal claims for conversion, or intentional interference with prospective business relationships, and intentional interference with a business relationship were ever presented at arbitration.

In *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238 (1985), this Court recognized the possibility that plaintiffs with claims arbitrable under the Federal Arbitration Act and non-arbitrable federal claims could face arguments that the decision of the arbitrable claims have a collateral estoppel effect in the subsequent proceedings. In *Byrd,* this Court stated:

> Other courts have held that the claims should be separately resolved, but that this preclusive effect warrants a stay of arbitration proceedings pending resolution of the [non-arbitrable] claim. In this case, Dean Witter also asked the district court to stay the arbitration proceedings pending resolution of the federal claim, and we suspect it did so in response to such holdings.

470 U.S. at 222. This Court ultimately held that the preclusive effect, if any, that the arbitration proceedings might have was not before it and did not decide the issue.

After the *Byrd* decision, the Ninth Circuit Court of Appeals decided *Clark v. Bear Stearns & Co., Inc.,* 966 F.2d

1318 (9th Cir. 1992), and explained, according to *Byrd, supra,* that by enforcing an agreement to arbitrate, the court ousted itself of jurisdiction. Conversely, as was the case in *Bear Stearns,* when a district court refused to compel arbitration of certain claims it retained jurisdiction, and the arbitration panel never obtained subject matter jurisdiction of the reserved claims. Thus, the arbitration decision had no *res judicata* effect. As stated by the Ninth Circuit Court of Appeals:

> By definition, res judicata bars only those grounds for recovery which could have been asserted in the prior litigation. *McClain v. Apodaca,* 793 F.2d at 1033. If a claim could not have been asserted in prior litigation, no interests are served by precluding that claim in later litigation. Another way of stating the same principle is that a claim is not barred by res judicata if the forum in which the first action was brought lacked subject matter jurisdiction to adjudicate that claim. *See Restatement (Second) of Judgments* § 26(1)(c); *Cullen v. Margiotta,* 811 F.2d 698, 732 (2nd Cir.), *cert. denied,* 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987).
>
> Here, pursuant to the terms of Bear Stearns' agreement with Clark, the district court refused to compel arbitration of Clark's federal securities claims, and in the process, retained jurisdiction for itself. *See D.G., Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 220, Fn.6 105 S.Ct. 1238, 1232 Fn. 6, 84 L.Ed.2d 764 (1985) (explaining that enforcing agreement to arbitrate ousts Court's jurisdiction). Because arbitration did not have subject matter jurisdiction over Clark's federal claims, Clark could not have brought those claims in the prior proceeding. Consequently, they are not barred by *res judicata.*

996 F.2d at 1321. The First Circuit and Second Circuit have reached the same conclusion. *See Wolf v. Gauntal & Co., Inc.*, 45 F.3d 524 (1st Cir. 1995), and *Cullen v. Margiotta*, 811 F.2d 698, 732 (2nd Cir.), *cert. denied*, 483 U.S. 1021 (1987).

This precedent was ignored by the Alabama Supreme Court, which held Lanier's claim of intentional interference with his sub-agency relationship was "within the scope of the [arbitration] submission" of the fraud claim ordered to arbitration by *Lanier I*. The issue was not whether the arbitrable and non-arbitrable claims were similar, or were within the same scope, but whether the arbitration panel ever had subject matter jurisdiction over the claims.

It is undisputed that the Alabama Supreme Court initially held that the conversion of expirations claim was not subject to arbitration and that the trial court ordered the conversion of expirations claim and the interference with sub-agency claim were not subject to being arbitrated. Although all claims which arise out of the same nucleus of facts are somewhat similar, not all similar claims have to be arbitrated because only those claims agreed to be arbitrated by the parties are subject to arbitration. As the Alabama Supreme Court in *Lanier I*, and the trial court upon remand, decided that all claims were not subject to arbitration, the arbitration decision could not have had a *res judicata* effect on the litigated claims. The arbitration panel simply never had subject matter jurisdiction over those claims.

The Alabama Supreme Court's decision expands arbitration under the Federal Arbitration Act to claims not covered by the arbitration agreement through the application of *res judicata* to non-arbitral claims. This negates this Court's directive that parties must arbitrate only claims which they agree to arbitrate. *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4

L.Ed.2d 1409 (1960); *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

Lanier petitions this Court to decide this issue of first impression, limit the application of the FAA to claims to which the parties have agreed to arbitrate, and prohibit the expansion of arbitration to non-arbitral claims by way of a wrongful application of *res judicata.*

II. Eliminating Petitioner's remedy while the case is pending violated his right to due process guaranteed by the Fourteenth Amendment.

The opinion below, applying *res judicata* to reverse a jury award, violated Lanier's right to due process by denying him a remedy during the pendency of his case. On April 29, 1994, the Alabama Supreme Court stated, "We hold that the claim of conversion and interference with business relationships is not subject to arbitration." *Lanier I* at 1258. Lanier relied on that decision and the orders of the circuit court upon remand, and did not present at arbitration his claims for conversion of expirations and interference with a business relationship between himself and his sub-agent. After a jury returned a verdict against the Old Republic companies for compensatory and punitive damages in the amount of $27,940,000 on these claims, a differently composed Alabama Supreme Court reversed, holding that the claims were barred by the doctrine of *res judicata* and should have been submitted to the arbitration panel. Lanier is now left with no forum to present his claims.

In *Reich v. Collins,* 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), this Court addressed whether Georgia violated a taxpayer's due process rights by changing his available remedies from postdeprivation to predeprivation during the pendency of his case. This

Court held, "[A] state may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *midcourse* — to 'bait and switch' as some have described it." *Id.* at 513 U.S. 111. When issuing the *Reich* decision, this Court relied on principles enunciated 34 years earlier in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d. 1488 (1958).

In *NAACP,* the Alabama trial court held an organization in contempt for failing to turn over its membership list pursuant to a discovery order. The Alabama Supreme Court refused to review the constitutionality of the contempt judgment on grounds that the NAACP failed to file a mandamus petition to overturn the discovery order. This Court found that contempt judgments, prior to the Alabama Supreme Court's ruling in this particular case, had been consistently reviewed by means other than mandamus petition. This Court, in essence, held that changing the rules in midcourse denies a litigant his due process rights guaranteed by the Fourteenth Amendment to the Constitution.

This Court had a chance to revisit its holding in *Reich* in *Newsweek v. Florida Department of Revenue,* 522 U.S. 442, 118 S.Ct. 904, 139 L.Ed. 888 (1998). In *Newsweek,* the State of Florida exempted newspapers, but not magazines, from a sales tax. The Florida Supreme Court found the statute violated the First Amendment of the United States Constitution. After the Florida Supreme Court's ruling, Newsweek applied for a refund from the Florida Department of Revenue, which was denied. The Florida District Court of Appeal affirmed the Department of Revenue's denial of Newsweek's refund, holding that an adequate predeprivation remedy existed. This Court held:

> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to

> taxpayers, like Newsweek, who reasonably relied on the apparent availability of a post payment refund when paying the tax. *Id.* U.S. 444-445.

Like the litigants in *NAACP, Reich* and *Newsweek*, Lanier is entitled to due process regarding his available remedies. He was entitled to rely, and reasonably did rely on the Alabama Supreme Court's holding that, "[T]he claim of conversion and interference with business relationships is not subject to arbitration." *Lanier I* at 1258. The Alabama Supreme Court, despite its waffling in its second opinion, did not hold that the claims for conversion ***may be, might be or could be,*** subject to arbitration. Instead, the Alabama Supreme Court clearly held that the interference and conversion claims were not subject to arbitration. Lanier reasonably relied on the Alabama Supreme Court's decision in *Lanier I,* and proceeded to trial. The Alabama Supreme Court's ruling in *Lanier II* denied his right to due process by performing a "bait and switch" on his available remedies.

III. Intentional torts arising outside the confines of the parties' contract are not subject to arbitration under the FAA.

Before the Alabama Supreme Court's opinion below, the intentional tort of interference with business relations was not subject to arbitration if a tortious act was separate and distinct from a contract which contained the arbitration clause. *Ex parte Discount Foods, Inc.*, 711 So.2d 992 (Ala. 1998). In *Ex Parte Discount Foods, Inc.*, a plaintiff sued alleging interference with business relations, unfair competition and violations of trade secret and antitrust law. The defendant moved to compel arbitration and the trial court agreed. The plaintiff appealed the trial court's decision to the Alabama Supreme Court. The Alabama Supreme Court reversed, holding:

> To hold otherwise would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have to answer for their actions before a jury of their peers.

Id. at 994. The defendant, dissatisfied with the Alabama Supreme Court's decision, applied for certiorari to this Court. Certiorari was denied. *Ex parte Discount Foods, Inc.*, 119 S.Ct. 71, 525 U.S. 825, 142 L.Ed.2d 56 (1998).[1] Interestingly, the arbitration clause applicable to the parties in *Ex parte Discount Foods, Inc.*, 711 So.2d 992 (Ala. 1998), is significantly broader than the arbitration clause applicable to Lanier.

Lanier's claims of intentional interference with prospective business relations (conversion of expirations) and intentional interference with his sub-agency relationship pertain to the interference of relationships he had with parties other than Old Republic. A similar intentional interference with relationships with third parties was the focus of the claims in *Ex parte Discount Foods, Inc.* Yet, in its opinion, the Alabama Supreme Court held that the intentional interference with Lanier's sub-agency relationship was "within the scope of the submission" of the fraud in the inducement claim Lanier presented in arbitration.

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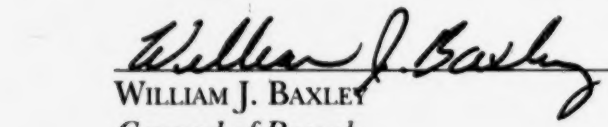
[1]In an opinion currently not released for publication, the Alabama Supreme Court has revisited its denial of arbitration in *Ex parte Discount Foods, Inc. Ex parte Discount Foods, Inc.*, 2001 WL 29199. In its latest opinion, the Alabama Supreme Court has reversed itself in the same case with the same parties now holding the parties are subject to arbitration. Fortunately, for the plaintiff, his claims had not been fully adjudicated at the time the Alabama Supreme Court reversed itself. Unlike Lanier, the plaintiff still has an available remedy for his interference claims, a right not afforded Lanier.

Intentional torts are not covered by the arbitration clause contained in Lanier's agency agreements (as set forth in *Lanier I*), because the clause is primarily concerned with performance and interpretation of contracts. *Lanier I,* 644 So.2d 1258, 1263 (Ala. 1994). Intentional torts arising out of interference with one party's relationship with a third party are not related to performance and interpretation of the contracts themselves.

CONCLUSION

For each of the three reasons discussed above, the Petitioner respectfully requests this Honorable Court grant his Petition for Writ of Certiorari, and, after a briefing on the merits, reverse the Alabama Supreme Court's ruling that the arbitration is *res judicata* to the jury's verdict.

Respectfully submitted,



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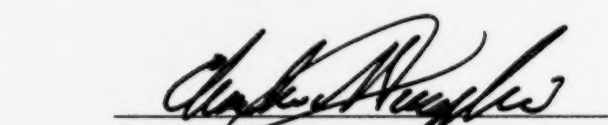
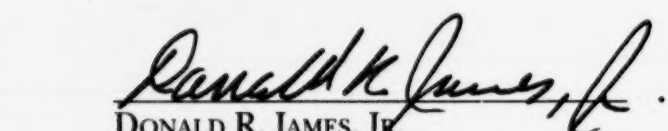
Counsel of Record



CHARLES A. DAUPHIN



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APPENDIX

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1971340

Old Republic Insurance Company and
Old Republic Union Insurance Company

v.

Tom Lanier, individually and d/b/a J.T. Lanier Agency

Appeal from Montgomery Circuit Court
(CV-92-2510)

PER CURIAM.

Old Republic Insurance Company and Old Republic Union Insurance Company (collectively "Old Republic") appeal from a judgment entered on a jury verdict in favor of Tom Lanier for $2,940,000 in compensatory damages, and $25 million in punitive damages. The dispositive issue on appeal is whether Lanier's action was barred by the doctrine of *res judicata*. We conclude that it was, and we therefore reverse and remand.

This litigation already has a considerable history. See *Old Republic Ins. Co. v. Lanier*, 644 So. 2d 1258 (Ala. 1994) *("Lanier I")*; see also *Lanier v. Old Republic Ins. Co.*, 936 F. Supp. 839 (M.D. Ala. 1996) *("Lanier II")*. The business relationships out of which the litigation arose are described in *Lanier I* and *Lanier II*, and will not be discussed here except as to those points pertinent to the new issues raised by this appeal.

At the core of these relationships are two substantively identical agreements between Lanier and Old Republic

(collectively the "Agreement"), *Lanier I,* 644 So. 2d at 1259, which were executed in 1987. *Lanier II,* 936 F. Supp. at 840. Pursuant to the Agreement, Lanier was to serve as an agent for Old Republic "in connection with an insurance program being developed to service the logging industry." *Lanier I,* 644 So. 2d at 1259. More specifically, it "authorized Lanier to solicit and bind worker's compensation and employer's liability coverage, comprehensive general liability coverage, automobile coverage, and inland marine insurance in Alabama, Florida, and Georgia." *Brief of Appellant,* at x-xi. The Agreement contained the following pertinent provisions:

"ARTICLE IX. ARBITRATION

"As a condition precedent to the institution of any action at law or in equity hereon, any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire meeting in the City of Chicago, Illinois, unless otherwise agreed.

". . . .

"ARTICLE X. TERMINATION OF AGREEMENT

"A. This Agreement shall be terminable at any time without cause by either party giving to the other party at least [90] days' prior notice of its intent to terminate.

"B. This Agreement shall terminate ten (10) days after the effective date of written notice given by either party to the other in the event of fraud, insolvency, or gross and willful misconduct on the part of such other party, unless cured within the ten day period. Such notice of termination shall state the grounds that the party giving notice relies upon in giving such notice of termination.

"C. This Agreement shall be terminable by [Old Republic] upon [Old Republic's] giving thirty (30) days' written notice to [Lanier] in the event of default if [Lanier] shall fail to correct such default within such period.

"D. In the event of a termination of this Agreement by [Old Republic] for cause under paragraphs B or C above, the ownership of all expirations on insurance written hereunder shall belong to [Old Republic]. Otherwise, the ownership of all insurance expirations shall belong to [Lanier], but only if [Lanier] has made all accountings, remitted all premiums due, and filed proof of such actions with [Old Republic].

"E. With any termination of this Agreement, [Lanier] shall cease to have any further authority hereunder, except that if this Agreement is terminated by prior written notice without cause, [Lanier] shall have the following limited authority as to the insurances written hereunder and which are still in force:

> "1. To continue such insurances for their remaining unexpired terms, subject to [Old Republic's] approval or as may be required by law, for which [Old Republic] shall pay [Lanier] commissions in effect at the time of any such renewals;
>
> "2. To issue and countersign endorsements, with respect to coverages under Schedule A, but only with prior written approval of [Old Republic];
>
> "3. To collect, receive and receipt for premiums becoming due on such policies and endorsements.

"The foregoing limited authority shall automatically terminate upon the cancellation, expiration or other termination of the insurances writ-

> ten hereunder or upon [Lanier's] breach of any of the limitations on such authority.
>
> "F. Termination by prior notice or otherwise shall not be construed as fully discharging either party's accounting and financial obligations hereunder, which shall be fully discharged as speedily as possible upon termination."

Additionally, in January 1991, Lanier contacted Rickie Wayne Chancy and Jeffrey R. Stoutamire, who owned Chancy-Stoutamire, Inc. ("C-S"), a "major [insurance] competitor" in Florida. Lanier proposed that C-S "com[e] in and writ[e] their business through [his] contract with Old Republic as a subagent." (Reporter's Transcript, at 829.) Consequently, in January 1991, Lanier and Chancy executed a "letter of intent," stating in pertinent part:

> "It is the intent of J. T. Lanier & Associates and Chancy-Stoutamire, Inc. hereinafter referred to as agencies to join together in a marketing plan for the states of Florida and Georgia.
>
> "It is further intended that these agencies place all qualified mechanized logging business in the current program *as specified in an Agency Agreement between John T. Lanier dba J.T. Lanier & Associates and [Old Republic].*
>
> ". . . .
>
> "It is further intended that non-compete agreements and formal agency marketing plans will be signed by each of the parties prior to March 1, 1991."

(Emphasis added.)

Also in January 1991, Lanier sent to Charles D. Jordan,[1] a letter, which stated in pertinent part:

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[1]Jordan was a "representative of Old Republic." *Lanier I*, 644 So. 2d at 1259 n.2.

> "I hereby authorize [Old Republic] to set up a company number for Chancy-Stoutamire, Inc. . . . The intent is for Chancy-Stoutamire, Inc. to submit all of their mechanized logging business that meets the underwriting requirements of the program for the State of Florida and the State of Georgia.
>
> " . . . .
>
> "Chancy-Stoutamire's agency contact is to be an a*ddendum to J.T. Lanier & Associates'* and should be contracted as a sub-agent *under our Agency Agreement.*
>
> "Chancy-Stoutamire will have the authority to solicit and bind coverages."

(Emphasis added.)

No noncompetition agreement between C-S and Lanier was ever executed. Moreover, Lanier and C-S had an "understanding: that the subagency could be cancelled arbitrarily by either party, at any time.

By mid-1992, Lanier's relationships with Old Republic and C-S had become strained. On June 1, C-S wrote a letter to Old Republic expressing an interest in terminating its subagency with Lanier and commencing a direct agency relationship with Old Republic. The letter stated in pertinent part:

> "Our agency has represented Old Republic through J.T. Lanier & Associates for the past eighteen months. We feel that the job we have done was good for both Old Republic [and] J.T. Lanier . . . as this is reflected in our agency loss runs.
>
> "J.T. Lanier & Associates has previously placed a restriction on our agency which hindered growth and profitability. They are now wanting to further restrict our profitability and we feel it is in our best interest to seek another market.

> We have been very pleased with the job that . . . Old Republic [has] done our agency.
>
> "Before talking to any other carriers, we would like to request a direct contract with Old Republic . . . . If this is possible, we would like to have all our business transferred as soon as possible. We would also request that no further data from our agency be sent to J.T. Lanier & Associates.

Old Republic forwarded this letter to Lanier.

On June 16, 1992, Lanier wrote to Old Republic, stating:

> "I am continuing to correspond with [C-S] to reach a satisfactory sub-agency agreement between them and myself . . . I do not intend to relinquish my rights to the *exclusive agency relationship* for Georgia, Alabama, and Florida and I do not intend to allow [C-S] to represent Old Republic on a direct basis. Until then, we should operate under the present sub-agency relationship."

(Emphasis added.) Subsequent attempts to resolve the difficulties between C-S and Lanier were, however, unsuccessful. Moreover, in a letter dated June 25, 1992, Old Republic accepted the offer of C-S to establish a "direct [agency] contract" with Old Republic.

On July 27, 1992, Old Republic formally notified Lanier of its intent to terminate his agency on October 26, 1992, that is, after 90 days. Effectively, however, Old Republic terminated the agency *immediately*. More specifically, Old Republic immediately ceased both (1) writing new policies and (2) renewing existing policies generated by Lanier.

On November 12, 1992, Lanier filed the six-count complaint commencing this action against Old Republic, C-S,

Charles Jordan, Rickie Wayne Chancy, and Jeffrey Stoutamire.[2] See *Lanier I*, 644 So. 2d at 1259. Counts one to three contained claims against Old Republic and Jordan. Counts four to six contained claims against the C-S defendants. Specifically, count one contained a "misrepresentation" claim against Old Republic and Jordan. *Id.* Count one alleged that "[i]n negotiations leading to the execution of the Agency Agreement, Old Republic . . . represented to . . . Lanier that [his] agency would be the exclusive agency for logging business in the states of Alabama, Georgia and Florida." It further alleged that "Lanier discovered the representations were false in June 1992." Count two contained a breach-of-contract claim, alleging breach of the Agreement. More specifically, count two alleged:

> "27. In July, 1992, [Old Republic] attempted to terminate the agency agreements . . . through written notice and claimed the contracts were terminated effective October 26, 1992.
>
> " . . .
>
> "31. Plaintiff avers the contracts can only be terminated on May 1st of each year and by the giving of 90 days notice prior to May 1st of each year.
>
> "32. [Old Republic has] refused to accept any business from J.T. Lanier & Associates since October 26, 1992.
>
> "33. Plaintiff avers [Old Republic has] breached the agency contracts . . . by refusing to accept any business after October 26, 1992.
>
> "34. As a proximate consequence of the breach, [Lanier has] suffered a loss of profits, loss of business opportunity, loss of clients and

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[2]Of these original defendants, Old Republic is the only defendant involved in this appeal.

> will be caused to suffer similar losses in the future."

Count three alleged as follows:

> "36. After notice of termination was forwarded to Lanier, Old Republic . . . began disclosing information regarding the clients of J.T. Lanier & Associates to Chancy-Stoutamire and other agents and began accepting new insurance from these clients written by agents other than J.T. Lanier & Associates.
>
> "37. The clients and the information pertaining to their accounts are the property of the Plaintiff.
>
> "38. Defendants . . . converted the client information for their own use and caused Plaintiff to lose the value of the accounts.
>
> "39. The conversion was intentional, malicious and contumely [sic]."

In *Lanier I*, this Court construed count three as an allegation that Old Republic had "converted for [its] own use Lanier's clients and information pertaining to those clients' accounts, thus interfering with his business relationships." *Id.* at 1259.

Old Republic moved to compel arbitration of the dispute on the basis of Article IX of the Agreement. The trial court "ordered arbitration as to the breach of contract claims, but denied the motion [to compel arbitration] as to the claims of fraud . . . and . . . conversion." *Id.* *Lanier I* represented, of course, this Court's disposition of the arbitration issues. Specifically, we reversed the order of the trial court as to the fraud claim, but affirmed the order of the trial court as to the breach-of-contract claim. *Id.* at 1263. We also affirmed the trial court's order as to the conversion claims. We stated: "Count three, alleging that Old Republic . . . converted Lanier's clients and

client information for [its] own use, '*appears* to raise issues largely distinct from the central conflict over the interpretation and performance of the [agreements themselves].'" *Id.* (quoting *Mediterranean Enters., Inc. v. Ssangyoung*, 708 F.2d 1458 (9th Cir. 1983) (emphasis added).

On July 2, 1993, while the appeal in *Lanier I* was pending, Lanier amended his complaint to add count eight, which alleged that Old Republic had interfered with the subagency contract between Lanier and C-S. After remand, Old Republic moved to compel arbitration of the interference-with-subagency claim. That motion was denied.

In that posture, the dispute proceeded to arbitration. In addition to compensatory damages under his breach-of-contract claim, Lanier sought punitive damages, as well as compensation for mental anguish, under this fraud claim. On July 14, 1995, after a four-day arbitration proceeding, the arbitration panel awarded Lanier $400,000 in compensatory damages on his breach-of-contract claim. However, it ruled in favor of Old Republic on the fraud claim. A judgment was entered in the United States District Court for the Middle District of Alabama confirming that award. See *Lanier II*, supra.

On August 4, 1997, Old Republic moved for a summary judgment on the conversion and interference-with-subagency claims still pending in the trial court. It argued, among other things, that the claims were barred by the doctrines of *res judicata* and collateral estoppel. On August 18, 1997, Lanier moved the court to allow him further to amend his complaint by adding a "Third Cause of Action Against Old Republic." Specifically, he alleged:

> "[A]fter his agency was terminated by [Old Republic, it] interfered with [his] *ownership of*

> *expirations* by: (a) using the expiration data . . . to review existing coverages and renew policies of [his] clients; (b) giving the expiration data to agents to enable agents to issue quotes to [his clients]; (c) competing with [him] for [his] clients."

Old Republic moved to strike the amendment on the grounds of *res judicata* and "similar principles."

On September 4, 1997, the trial court granted Old Republic's summary-judgment motion as to the *conversion* claim. However, the trial court granted Lanier's motion to add the claim alleging interference with his ownership of the expirations.[3] Over Old Republic's motions for a judgment as a matter of law, both claims, namely, the claim alleging interference with the subagency and the claim alleging interference with ownership of the expirations, were submitted to the jury.

The jury awarded Lanier $27,940,000, which it apportioned between the two claims. On the subagency claim, the jury awarded $1.36 million in compensatory damages and $10 million in punitive damages. On the expirations claim, it awarded $1.58 million in compensatory damages and $15 million in punitive damages. The court entered a judgment on that verdict; Old Republic's post-trial motions were denied by operation of law. From that judgment, Old Republic appealed, reiterating its contention that the arbitration of this dispute was *res judicata* as to its subsequent litigation. We agree with this contention.

As we stated in *Hughes v. Martin*, 533 So. 2d 188, 190 (Ala. 1988):

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[3]The term "expirations" refers to "a list of the agency's customers." (Reporter's Transcript, at 787.) It "includes the names, the expiration dates, the effective dates, the coverages, the limits, the agency files and . . . the right to collect commissions on that business." *Id.*

> "Res judicata is a broad, judicially developed doctrine, which rests upon the ground that public policy, and the interest of the litigants alike, mandate that there be an end to litigation; that those who have contested an issue shall be bound by the ruling of the court; and that issues once tried shall be considered forever settled between those same parties and their privies."

"The . . . elements of *res judicata* are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions." *Equity Resources Management, Inc. v. Vinson,* 723 So. 2d 634, 636 (Ala. 1998). "If those four elements are present, then any claim that was, or that *could have been,* adjudicated in the prior action is barred from further litigation." *Id.* (emphasis added).

In Alabama, as elsewhere, an arbitration award "partakes of the nature of a judgment or decree of a competent court, and may be pleaded in bar of a subsequent suit founded on the same [cause of action]." *Glens Falls Ins. Co. of New York v. Garner,* 229 Ala. 39, 41, 155 So. 533, 534 (1934). See also *American Ins. Co. v. Messinger,* 43 N.Y.2d 184, 188, 371 N.E.2d 798, 801 (1977) ("doctrines of [*res judicata* and collateral estoppel] apply as well to awards in arbitration as they do to adjudications in judicial proceedings"); *Manu-Tronics, Inc. v. Effective Management Sys., Inc.,* 163 Wis. 2d 304, 311, 471 N.W.2d 263, 266 (Wis. App. 1991) ("Essential to arbitration remaining useful is the elementary principle that the doctrines of res judicata and collateral estoppel are applicable to arbitration awards."); *Restatement (Second) of Judgments* § 84(1) (1982) ("a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court").

Lanier does not challenge these general principles. He relies, however, on *Restatement (Second) of Judgments* § 26 (1982), which states that the doctrine of *res judicata* does not necessarily apply when "[t]he plaintiff was unable to rely on a certain theory. . . or to seek a certain remedy or form of relief in the first action because of . . . limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies." He contends that the arbitration panel never acquired subject-matter jurisdiction over the two "claims" he eventually litigated. This is so, because, he argues, this Court in *Lanier I* ordered only the arbitration of his claims of fraud and breach of contract. Thus, he concludes, the arbitration panel did not have subject-matter jurisdiction of his claims of interference with (1) the subagency and (2) the expirations. We disagree with this conclusion.

In Alabama "[i]t is well-settled that 'the principle test for comparing causes of action [for the application of *res judicata*] is whether the primary right and duty or wrong are the same in each action.'" *Wesch v. Folsom,* 6 F.3d 1465, 1471 (11th Cir. 1993) (emphasis added), *cert. denied sub nom. Sinkfield v. Wesch,* 510 U.S. 1046 (1994). "Res judicata applies not only to the *exact legal theories* advanced in the prior case, but to *all legal theories and claims* arising out of the same nucleus of operative facts." *Id.* (emphasis added). "The question of whether the same evidence substantially supports both actions. . . . It is considered the same cause of action when the same evidence is applicable in both actions." *Hughes v. Martin,* 533 So. 2d 188, 191 (Ala. 1988). As it is sometimes stated, "'[w]here two successive suits seek recovery for the same injury, a judgment on the merits operates as a bar to the later suit, even though a different legal theory of recovery is advanced in the second suit.'" *Silcox v. United Trucking Serv., Inc.,* 687 F.2d 848, 852 (6th Cir. 1982);

Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434, 437 (6th Cir. 1981); see also *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1166 (1st Cir.), *cert. denied*, 502 U.S. 816 (1991).

As a practical matter, if a plaintiff could avoid the application of *res judicata* to disputes he submitted to arbitration simply by restating the dispute in terms of a different legal theory, arbitration would be a waste of time and resources. Other courts have recognized this principle. For example, *Goldstein v. Doft*, 353 F.2d 484 (2nd Cir. 1965) (per curiam) stated:

> "As with appellant's other claims on the merits, the difference between the issues litigated before the arbitrators and those attempted to be presented in this subsequent litigation is one of semantics only. . . . Arbitration would be of little value if the entire controversy or any part thereof could be reopened later by a mere change in the words or phrases used to characterize the matters included in the claim the arbitrators had rejected."

Id. at 484.

See also *Fink v. Golenbock*, 238 Conn. 183, 680 A.2d 1243 (1996), where the court concluded that the arbitration of claims by Theodore Fink, a corporate shareholder, against Joan Magner, a corporate employee, for breach of an employment contract and a covenant not to compete, pursuant to an agreement requiring arbitration of "*[a]ny disputes* arising under [an employment contract]," 238 Conn. at 196, 680 A.2d at 1252 (emphasis added in *Fink*), barred the subsequent litigation in a shareholder's derivative action by Fink against Magner of claims that Magner "wrongfully converted the assets of the corporation, . . . tortiously interfered with the reasonable business expectancies of the corporation, . . . and . . . violated the Connecticut Unfair Trade Practices Act

['CUTPA']." 238 Conn. at 185, 680 A.2d at 1247. The court explained:

> "Our examination of the claims that were actually decided in the arbitration proceeding and those that could have been decided because they were *within the scope of the submission* persuades us that the claims asserted in the present action are barred by res judicata. . . .
>
> "The tort claims and the claim for a violation of CUTPA that the plaintiff litigated in this action could have been brought in the arbitration proceeding. These types of actions are encompassed within the broad and unrestricted submission agreed to by the parties. The predicate for these claims is a *dispute arising under* the employment agreement between Magner and the plaintiff because it is this agreement that establishes the employment relationship from which the underlying conduct that forms the basis of the dispute stems. . . . Because the factual underpinnings of these claims and those that were actually arbitrated are the same, we are persuaded that the transactional test is satisfied."

238 Conn. at 196-97, 680 A.2d at 1252 (emphasis added) (footnote omitted).

This Court has not construed the phrase "arising under" as broadly as *Fink*. See *Lanier I,* 644 So. 2d at 1262 (Alabama interprets the phrase "arising under" more narrowly than the phrase "arising out of or relating to"). Nevertheless, the issue in this case is the same as the issue in *Fink,* namely, whether the claims Lanier litigated "were *within the scope of the submission*" to arbitration. 238 Conn. at 196, 680 A.2d at 1252 (emphasis added). We conclude that they were. In fact, *Lanier I* ordered the arbitration of *all* "'"*disputes and controversies* relating to the interpretation of the contract and matters of performance."'" 644

So. 2d at 1262 (emphasis added) (quoting with approval *Mediterranean Enters., Inc. v. Ssangyoung,* 708 F.2d 1458, 1464 (9th Cir. 1983)). Of course, that order included Lanier's claims alleging (1) fraud and (2) breach of contract. But we did not intend to restrict the subject-matter jurisdiction of the arbitration panel to claims stated in those specific terms. Instead, consistent with our rules of *res judicata,* we limited the scope of arbitration only to the cause, or causes, of action that the theories of breach of contract and fraud were designed to remedy. As previously noted, our comment describing Old Republic's claim of conversion as raising issues "distinct from the central conflict over the interpretation and performance of the [agreements themselves]," *Lanier I,* 644 So. 2d at 1263, was clearly limited by the statement that that "appear[ed]" to be the case. *Id.* Lanier's right to avoid an arbitration judgment binding on other matters turned on what we previously described as the appearance of things becoming a reality. Such is not the case.

Actually, this case involves two causes of action. One cause of action was Old Republic's alleged wrongful termination of the Agreement. The second cause of action was Old Republic's direct dealing with C-S in disregard of the alleged exclusive agency. Thus, if the claims alleging interference with the expirations and with the subagency were based on the same causes of action as the claims alleging breach of contract and fraud, then the former claims were barred by the doctrine of *res judicata.*

I. Interference with Expiration/Breach of Contract

This cause of action was arbitrated in connection with Lanier's breach-of-contract claim. A comparison of Lanier's claims alleging breach of contract and interference with expirations reveals that the "primary right and duty or wrong" complained of are the same in both. More specifically, the gravamen of each claim is that Old

Republic wrongfully, that is, *prematurely,* terminated Lanier's agency. A primary component of damages flowing from that termination was, as Lanier's breach-of-contract count stated, the "loss of profits, loss of business opportunity, loss of clients and . . . similar losses in the future."

The trial court ordered depositions of members of the arbitration panel in order to determine the basis for awarding Lanier $400,000 on his breach-of-contract claim. Excerpts of those depositions were read at trial. The testimony revealed that the award was based on a finding that Old Republic had breached two specific provisions of the Agreement, namely, Article X.A. ("This Agreement shall be terminable at any time without cause by either party giving to the other party at least [90] days' prior notice of its intent to terminate"); and X.D. ("In the event of a termination of this Agreement by [Old Republic] for cause under paragraphs B or C above, the ownership of all expirations on insurance written hereunder shall belong to [Old Republic]. Otherwise, the ownership of all insurance expirations shall belong to [Lanier] . . ."). More specifically, the panel concluded that "the breach occurred because the 90-day period was not . . . followed through on by Old Republic," and that Old Republic was "soliciting business during that 90-day period." (Reporter's Transcript, at 1725).

Lanier contends that the "claim for interference with his expirations did not even arise until after October 26, 1992, the date his termination became effective. Prior to this date Lanier was an agent and the agency provisions regarding ownership of expirations did not apply." *Brief of Appellee,* at 12-13. Thus, he argues, he had no cause of action for interference with expirations that the arbitrators could have considered.

This argument, however, overlooks the fact that Old Republic treated the agency as terminated *immediately,*

that is, as of July 27, 1992. As the arbitrators found, Old Republic began "interfering" with Lanier's expirations *as of that date.* In other words, as of July 27, Old Republic actually (1) treated the Agreement as terminated; (2) disavowed Lanier's agency; and (3) began using the expirations. The arbitration panel necessarily considered that interference when it awarded Lanier $400,000 in damages based on Old Republic's breach of Article X.D. and the use of Lanier's expirations between July 27 and October 26.

Moreover, count two of the complaint, in which Lanier sought compensation for breach of contract, specifically requested *future* "loss of profits, loss of business opportunity, [and] loss of clients." Relief for these future losses is precisely the species of relief to which Lanier claims to be entitled for interference with the expirations since October 26, 1992. The arbitrators rejected Lanier's claim for those future losses. Obviously, the correctness of the arbitration award is not before us for review. It is equally obvious (1) that Lanier's cause of action for wrongful termination of the Agreement accrued before October 26, 1992; (2) that it was presented to the arbitration panel under the theory of breach of contract;[4] and (3) that the claim for interference with expirations based on that same cause of action is now barred by the doctrine of res judicata.[5]

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[4]In this connection, we hasten to reiterate that the parties' rights to the expirations after termination of the Agreement *arose directly under Article X.D. of the Agreement.* In other words, Old Republic's interference with the expirations *was* the breach of contract. Thus, the dispute over the expirations was squarely "within the scope of the submission" ordered by *Lanier I.* Clearly, the arbitration panel had subject-matter jurisdiction over it. Consequently, the exception in § 6, *Restatement (Second) of Judgments,* on which Lanier relies, does not apply.

[5]This conclusion is not inconsistent with our disposition of the conversion claim in *Lanier I,* where — before the evidence was fully

II. Interference with Subagency/Fraud

The second cause of action was Old Republic's direct dealing with C-S in disregard of the alleged exclusive agency. It was arbitrated in connection with Lanier's fraud claim. Lanier's theory of the case — both in arbitration and in litigation — was that Old Republic engaged in a plan or scheme to "gain control of the *marketing of the timber program* and to put Lanier out of business." *Arbitration Brief,* at 17. Also, he argued, "[t]here is no doubt that Old Republic's actions were intentional and designed with the specific purpose to steal *the program* from Lanier and then drive him out of business, thereby eliminating its main competition." Id. In his brief to this Court, he makes the same arguments, stating: "Clearly, the elimination of Lanier to gain control of the program was [Old Republic's] main goal." Brief of Appellee, at 49.

Under this theory, one of the means by which Old Republic sought to implement the scheme was misrepresentation regarding the question whether an exclusive agency existed. Another means was its dealings with C-S.

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developed in arbitration or in litigation as it has been now — we said: "Count three, alleging that Old Republic . . . converted Lanier's clients and client information for [its] own use, '*appears to raise* issues largely distinct from the central conflict over the interpretation and performance of the [agreements themselves].'" 644 So. 2d at 1263 (emphasis added). The conversion claim was extinguished by a summary judgment. To the extent the interference-with-expirations claim replaced it, the complaint's statement of the latter claim differed substantially from that of the former. Significantly, the conversion claim made no mention of the expirations, and the expirations claim made no mention of conversion. At any rate, a comparison of the transcript of the arbitration proceedings with the trial transcript leaves no doubt that the expirations claim was based on the same cause of action as the breach-of-contract claim submitted to arbitration.

Old Republic's plan to "steal the program," according to Lanier, began in, or around, December 1991, and included its dealings with C-S. *Id.* at 18. Indeed, Lanier's relationship with C-S was an integral part of his "program."

In order to demonstrate Old Republic's methods and intentions toward Lanier's agency, Lanier presented to the arbitration panel evidence of the mid-1992 correspondence and transactions between Old Republic and C-S leading to the dissolution of the subagency. His arbitration brief outlined those facts in detail as evidence that Old Republic intentionally "set about destroying [his] agency." *Id.* at 13-15. To the arbitration panel, Lanier argued strenuously that these transactions warranted the imposition of punitive damages against Old Republic under Lanier's fraud claim. In his brief to this Court, under the heading "Degree of Reprehensibility," he relies on the same facts — set forth in substantively identical terms — to justify the jury's punitive damages award on his expirations and subagency claims. *Brief of Appellee,* at 39-40. He argues that those transactions "paint a vivid picture of *connivance and deceit.*" *Id.* at 39 (emphasis added).

Moreover, the *compensatory*-damages calculations Lanier submitted to the arbitration panel mirror the calculations he presented to the jury. To the arbitration panel, he argued that the "value of [his] exclusive rights to the program include[d the] investment or override opportunity" he enjoyed through his subagency with C-S. *Arbitration Brief,* at 9. He argued that "[w]ithout Old Republic's behind the scenes involvement, C-S would have continued as a sub-agent." *Id.* at 10. Both to the panel and to the jury, Lanier presented the expert testimony of Dave Borden, who testified that Lanier's compensable loss was $2.94 million, which included the difference between the value of Lanier's agency *before*

"Chancy-Stoutamire went direct" and the value of his agency after his "relationship with Old Republic was terminated." (Reporter's Transcript, at 1048.) (Emphasis added.) See Clerk's Record, at 1603.

Relying, apparently, on this testimony, the jury awarded precisely $2.94 million in compensatory damages. Lanier thus was awarded damages in the litigation for the same injuries for which he had sought damages in arbitration. This, he could not do. See *Silcox v. United Trucking Serv., Inc.*, 687 F.2d 848, 852 (6th Cir. 1982).

Additionally, Lanier conceded to the panel:

> "Even though there is a claim for conversion of expirations still pending in the lawsuit, Old Republic has denied any liability. . . . The claims which have been presented to this panel are not part of the conversion claim and a jury will never be asked to consider them.
>
> *"The issues which have been presented to this panel comprise the heart of Lanier's claims against Republic."*

Arbitration Brief, at 22 (emphasis added).

Finally, it must not be overlooked that Lanier's subagency claim arose under the Agreement containing the arbitration clause. This is so, because the subagency itself arose under the Agreement, that is, it "relat[ed] to the interpretation of the contract and matters of performance." *Lanier I,* 644 So. 2d at 1262. The Agreement was expressly referenced in the January 1991 letter of intent, which set forth the purposes of the relationship between Lanier and C-S. Those purposes were further described in the Lanier-to-Jordan letter, which described the proposed subagency "contract" as "an addendum to J.T. Lanier & Associates," to be "contracted as a sub-agent under *[the] Agreement."* (Emphasis added.) Thus, because the subagency arose under the Agreement, claims against

a party to the Agreement for that party's interference with the subagency also arise under the Agreement.

These and many similar considerations convince us that the "nucleus of operative facts," *Wesch v. Folsom*, 6 F.3d 1465, 1471, which Lanier characterizes as "connivance and deceit" for purposes of his interference-with-subagency claim, constitutes the same cause of action that he presented to the arbitration panel as a basis for his fraud claim. Thus, the interference-with-subagency claim was "within the scope of the submission," *Fink*, 238 Conn. at 196, 680 A.2d at 1252, of the fraud claim ordered to arbitration by *Lanier I*. Consequently, the arbitration panel had subject-matter jurisdiction of that cause of action, and the exception advanced in § 26, *Restatement (Second) of Judgments*, on which Lanier relies, does not apply.[6]

For these reasons, the judgment of the trial court is reversed and the cause is remanded for disposition consistent with this opinion.

REVERSED AND REMANDED.

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

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[6]The inapplicability of § 26 is further attested by the fact that the *species* of damages awarded by the trial court were fully recoverable in arbitration *under the fraud claim*. That they were not awarded in arbitration does not relieve Lanier of the operation of the doctrine of *res judicata*.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1921387

Old Republic Insurance Company, et al.

v.

Tom Lanier, d/b/a J. T. Lanier & Associates
and Chattawood Insurance Company, Inc.

Appeal from Montgomery Circuit Court
(CV-92-2510)

SHORES, JUSTICE.

This is an appeal from an order that partially denied motions to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). The basic issue presented is whether claims of fraud in the inducement and of conversion and interference with business relationships arose out of contracts containing arbitration clauses and are, thus, subject to arbitration under the FAA. We hold that the claim of conversion and interference with business relationships is not subject to the FAA.

The following facts are undisputed:

Tom Lanier, doing business as J. T. Lanier & Associates, and Chattawood Insurance Company, Inc. ("Chattawood"), sued Old Republic Insurance Company, Old Republic Union Insurance Company, Charles D. Jordan, Chancy-Stoutamire, Inc., Rickie Wayne Chancy, and Jeffrey R. Stoutamire. The disputes in this case center around three contracts containing arbitration provisions: an "agency agreement" between Lanier & Associates and Capitol Fire & Marine Insurance Company; an "agency

agreement" between Lanier & Associates and Old Republic Insurance Company; and a "quota share reinsurance agreement" between Chattawood Insurance Company and Capitol Fire & Marine Insurance Company.[1] In count one, Lanier basically alleged fraud in the inducement of his agency contracts with the insurance companies, contending that Old Republic Insurance Company ("Old Republic"), Old Republic Union Insurance Company ("Old Republic Union"), and Charles D. Jordan misrepresented that Lanier would enjoy exclusive agency status in connection with an insurance program being developed to service the logging industry.[2] In count two (breach of contract), Lanier alleged that Old Republic and Old Republic Union breached their respective agency agreements with him, and that Old Republic Union breached its reinsurance agreement with Chattawood. In Count three (conversion), Lanier alleged that Old Republic and Old Republic Union converted for their own use Lanier's clients and information pertaining to those clients' accounts, thus interfering with his business relationships.[3]

In response to the complaint, Old Republic, Old Republic Union, and Jordan moved the trial court to stay the action and to compel arbitration pursuant to the Federal Arbitration Act. Specifically, the appellants contended that each agreement contained an arbitration provision obligating the parties to submit to arbitration

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[1]Old Republic Union Insurance Company was doing business under its former name Capitol Fire and Marine Insurance Company when it entered into business relations with Lanier & Associates and with Chattawood Insurance Company.

[2]Jordan was, at the time of the alleged misrepresentation, a representative of Old Republic and an executive vice president of Capitol Fire & Marine Insurance Company.

[3]Relief is not sought from the appellants on the three remaining counts.

any dispute arising out of the particular agreement at issue. On May 13, 1993, the trial court granted the motion to stay and ordered arbitration as to the breach of contract claims, but denied the motion as to the claims of fraud in the inducement and of conversion and intentional interference with business relationships.[4] Old Republic Insurance Company, Old Republic Union Insurance Company, and Charles D. Jordan appeal, arguing that the trial court impermissibly restricted the arbitration clauses in question.[5]

The parties present a single issue on appeal: Do the disputes between the parties fall within the arbitration provisions of their contracts? If so, the FAA will apply. In this case, the appellants argue that the arbitration clauses are broad and were designed to cover any disputes between the parties. On the other hand, the appellees argue that the language of the arbitration clauses limits

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[4]The appellants contend that we need not address the court's denial of arbitration on the conversion and intentional interference with business relationships claim, because, after this appeal was filed, the trial court entered an order on August 6, 1993, finding the conversion and intentional interference with business relationships count to be arbitrable. Although not in the record, the August 6 order compelling arbitration must have amended the May 13 order, which indicated that the conversion and intentional interference with business relationships count was not arbitrable. However, the filing of the notice of appeal on June 15, 1993, immediately transferred jurisdiction of the May 13, 1993, order to this Court. Consequently, the trial court was without jurisdiction to amend the May 13, 1993, order. See *Thames v. Gunter-Dunn, Inc.*, 365 So.2d 1216, 1217 (Ala. 1979). Therefore, we must address the appeal from the denial of arbitration on the conversion and intentional interference with business relationships count.

[5]"Orders refusing to stay proceedings pending arbitration and orders refusing to compel arbitration are appealable. See 9 U.S.C. § 16(a)(1)(A) and (B) and *A.G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358, 360-61 (Ala. 1990)." *Continental Grain Co. v. Beasley*, 628 So.2d 319, 322 n.3 (Ala. 1993).

the scope of disputes to which arbitration was intended to apply. The parties dispute what claims or collateral issues were covered by the arbitration provisions of the contracts.

Under Alabama law, the specific enforcement of a predispute arbitration agreement violates public policy unless federal law preempts state law. See § 8-1-41(3), Ala. Code 1975; *Wells v. Mobile County Bd. of Realtors, Inc.*, 387 So.2d 140, 144 (Ala. 1980); *Bozeman v. Gilbert*, 1 Ala. 90, 91 (1840). "However, if an arbitration agreement is voluntarily entered into and is contained in a contract that involves interstate commerce, then the FAA preempts state law and renders the agreement enforceable." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 628 So.2d 354, 355 (Ala. 1993), *cert. granted*, 62 U.S.L.W. 3454 (U.S. Mar. 21, 1994) (No. 93-1001), *citing A.G. Edwards & Sons, Inc. v. Syvrud*, 597 So.2d 197 (Ala. 1992); see, *Ex parte Alabama Oxygen Co.*, 433 So.2d 1158 (Ala. 1983), *vacated*, 465 U.S. 1016 (1984).

On appeal, the parties do not argue that these contracts do not evidence a transaction involving interstate commerce. "Therefore, the policies and provisions of the FAA govern all questions of the validity, interpretation, construction, and enforceability of the arbitration agreement." *Blount Int'l, Ltd. v. James River-Pennington, Inc.* [Ms. 1911811, March 26, 1993], ___ So. 2d ___ (Ala. 1993). The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Services, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Whether arbitration applies to a dispute between parties "is to be determined by the contract entered into by the parties." *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l*, 370 U.S. 254, 256 (1962). Therefore, "a party cannot be required to submit to arbitration any dispute he has not agreed to submit."

A.G. Edwards & Sons, Inc. v. Clark, 558 So. 2d 358, 362 (Ala. 1990). In the event of ambiguity or uncertainty over applicability of an arbitration clause, the strong Federal policy embodied in the Federal Arbitration Act requires a reviewing court to resolve any ambiguities or uncertainties in favor of arbitration. *Volt Info. Services, supra,* 489 U.S. at 475. In addition, "[t]he courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the interest of the parties." *Goldberg v. Bear, Stearns & Co.,* 912 F.2d 1418, 1419-20 (11th Cir. 1990).

Our analysis must, therefore, begin with the language of the arbitration provisions. Article IX of the agency contract between Old Republic and J.T. Lanier & Associates, in pertinent part, reads as follows:

> "As a condition precedent to the institution of any action at law or in equity hereon, any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire meeting in the City of Chicago, Illinois, unless otherwise agreed."

(C.R. 54).[6] Article XVII of the "Quota Share Reinsurance Agreement" between Chattawood and Old Republic Union states in pertinent part:

> "(a) As a condition precedent to any right of action hereunder, any dispute arising out of the Agreement shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire, meeting in the City of Chicago, Illinois unless otherwise agreed."

(C.R. 69.)

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[6]An identical provision appeared in the agency contract between Lanier & Associates and Old Republic Union. (C.R. 34.)

The trial court narrowly construed the arbitration clauses, holding the following:

> "1. The language of Article IX of the Agency Contract is narrowingly [sic] drawn and the arbitrable matters are restricted to disputes or controversies relating to interpretation of the Agency Agreement and matters of performance. *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress, Int'l, Ltd.*, 803 F. Supp. 1358 (N.D. Ill. 1992). Therefore, the only claim which is subject to arbitration is the claim for breach of contract, and the claims for fraud in the inducement, conversion and intentional interference with business relationships are not subject to arbitration.
>
> "2. The same reasoning and holding applies to the language in Article XVII of the Quota Share Reinsurance Agreement. In addition, the Court finds that the reinsurance agreement has a 'slight' nexus with interstate commerce; therefore, matters relating to its interpretation and performance under it are subject to arbitration."

(C.R. 121.)[7]

The trial court based its holding on *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress, Int'l, Ltd.*, 803 F. Sup. 1358

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[7]In *Ex parte Jones*, 628 So. 2d 316 (Ala. 1993), we explicitly rejected the "slightest nexus" standard for determining when a contract involves interstate commerce under the FAA, in favor of the "contemplation" standard of *Ex parte Warren*, 548 So. 2d 157 (Ala.), *cert. denied*, 493 U.S. 998, 110 S. Ct. 544, 107 L.Ed.2d 550 (1989). The *Warren* test examines whether the parties "contemplated substantial interstate activity" at the time they entered into the contract and accepted the arbitration clause. The parties here do not dispute that the contracts involved interstate commerce.

(N.D. Ill. 1992). The language of the arbitration provision interpreted in *Sweet Dreams* was as follows: "Any disputes arising out of agreement shall be settled and determined by [arbitration]." *Sweet Dreams,* 803 F. Supp. at 1359. In that case, the district court held that the agreement to arbitrate was limited to matters involving contract interpretation or performance when it referred to controversies under or arising out of the contract. This narrow interpretation of the arbitration provision was reversed by the Court of Appeals for the Seventh Circuit in *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.,* 1 F.3d 639 (7th Cir. 1993).

The Seventh Circuit held that "any dispute between contracting parties that is in any way connected with their contract could be said to 'arise out of' their agreement and thus be subject to arbitration under a provision employing this language." *Id.* at 642. Based upon this broad interpretation and the federal presumption in favor of arbitration, the Seventh Circuit concluded that the fraudulent inducement count and the intentional interference with business relationships count were "related to the subject matter of the arbitration clause and [were] subject to arbitration under it." *Id.* at 643. The arbitration provisions at issue in this case specifically state that "any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration." Count one of Lanier's complaint basically alleges fraud in the inducement, and count three alleges conversion and intentional interference with business relationships.

However, we disagree with the Seventh Circuit's broad interpretation of when the FAA should apply. We consider that interpretation to be contrary to our strong public policy against the use of predispute arbitration agreements, and we reject the reasoning of *Sweet Dreams.* Rather, we find the interpretation of the Ninth Circuit Court of Appeals as to when the FAA should apply, as set

forth in *Mediterranean Enterprises, Inc. v. Ssangyong*, 708 F.2d 1458 (9th Cir. 1983), to be compelling.

The determination of whether the FAA applied to compel arbitration of the dispute in *Mediterranean* turned on the interpretation of the language of the arbitration clause itself, as was the case in *Sweet Dreams*. The arbitration provision interpreted in *Mediterranean* stated: "Any disputes arising hereunder or following the formation of joint venture shall be settled through binding arbitration. . . ." 708 F.2d at 1461. The Ninth Circuit suggested an equation between the use of the phrase "arising hereunder" and the use of similar language in other arbitration provisions that referred to disputes or controversies "under" or "arising out of" the contract containing the arbitration clause. That court agreed with the argument that "the phrase 'arising hereunder' means 'arising under the terms of the contract itself' and was not intended to cover 'matters or claims independent of the contract or collateral thereto,'" *Id.* at 1463, and the court presented the following analysis:

> "We interpret 'arising hereunder' as synonymous with 'arising under the Agreement [containing the arbitration clause].' The phrase 'arising under' has been called 'relatively narrow as arbitration clauses go.' *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 364 (S.D.N.Y. 1966). In *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961), Judge Medina concluded that when an arbitration clause 'refers to disputes or controversies "under" or "arising out of" the contract,' arbitration is restricted to 'disputes and controversies relating to the interpretation of the contract and matters of performance.' Judge Medina reasoned that the phrase 'arising under' is narrower in scope than the phrase 'arising out of or relating to,' the standard language

recommended by the American Arbitration Association. *Id.*

"In a recent case, a district court amplified Judge Medina's reasoning. In *Michele Amoruso e Figli v. Fisheries Development Corp.*, 499 F. Supp. 1074, 1080 (S.D.N.Y. 1980), the court discussed the Supreme Court's interpretation of an arbitration clause, noting that 'arising out of or relating to this agreement' had been labelled a 'broad arbitration clause.' *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 1803, 10 L.Ed.2d 1270, 1274 (1967)). The court went on to say that in the case before it, 'the clause is limited to differences or disputes "arising out of this Agreement"; notably, it omits reference to disputes "relating to" the agreements. The omission is significant in the Second Circuit.' *Michele Amoruso e Figli*, 499 F. Supp. at 1080.

"The omission should be significant in this circuit as well. . . . We have no difficulty finding that 'arising hereunder' is intended to cover a much narrower scope of disputes, *i.e.*, only those relating to the interpretation and performance of the contract itself."

Mediterranean Enterprises, Inc. v. Ssangyong, 708 F.2d at 1464.

To comport with our strong public policy against arbitration, we must adopt a narrow standard for determining when the FAA applies, rather than a broad standard such as the one in *Sweet Dreams*. Therefore, we agree with, and explicitly adopt, the reasoning set forth in *Mediterranean Enterprises* and in *Michele Amoruso e Figli*.

In light of our interpretation of the arbitration provisions at issue here, we must next decide whether the trial court erred when it refused to submit the fraud and the conversion and interference with business relationships

counts to arbitration. To do so, we must determine the extent to which these counts against the appellants "refer to disputes or controversies relating to the interpretation and performance of [each representative] contract itself." *Mediterranean Enterprises,* supra, at 1464.

Count one, alleging fraud in the inducement of the agency contracts between Lanier and Old Republic and between Lanier and Old Republic Union, falls within the scope of the arbitration clauses. In the seminal case of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), Prima Paint sought rescission of a contract on the grounds that it had been procured by fraud. The United States Supreme Court, in holding the dispute subject to arbitration, stated:

> "[I]f the claim is fraud in the inducement of the arbitration clause itself — an issue which goes to the 'making' of the agreement to arbitrate — the . . . court may proceed to adjudicate it. But the statutory language [of the FAA] does not permit the . . . court to consider claims of fraud in the inducement of the contract generally. . . . We hold, therefore, that . . . [a] court may consider only issues relating to the making and performance of the agreement to arbitrate.

Prima Paint, 388 U.S. at 403-04, 87 S. Ct. at 1806, 18 L.Ed.2d at 277 (footnotes omitted).

> "Since *Prima Paint,* it has become clear that in cases involving claims of fraud in the inducement of a contract affecting interstate commerce, the court must first determine whether the fraud claim is directed solely at the arbitration clause *itself.* If so, the party opposing arbitration is entitled to a trial involving state law issues relating to the making of the arbitration clause."

Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 604 So.2d 332, 337 (Ala. 1991). (Citations and explanatory statements omitted.)

> "We note in this regard, that if fraud is alleged with respect to an *arbitration provision itself,* rather than toward the entire . . . agreement that encompasses it, the claimant is not forced to arbitrate the claim under the FAA. Simply stated, if the fraud question relates solely to the valid creation of the requirement of arbitration, rather than the entire . . . agreement, this claim can be litigated on state law contract principles to determine if the arbitration provision is to be rescinded."

A.G. Edwards & Sons, Inc. v. Syvrud, 597 So.2d 197, 199 (Ala. 1992).

Lanier alleged in count one that "authorized employees" of the appellant insurance companies misrepresented to him during negotiations leading to the execution of the two agency agreements that Lanier & Associates would be the "exclusive agency" for the logging insurance program in Alabama, Florida, and Georgia, but that he later learned of another insurance agency involved in the logging insurance program of Old Republic and that of Capitol Fire & Marine Insurance Company.[8] (C.R. 4-5). Lanier contended that he was fraudulently induced to enter into the agency contracts based on the alleged misrepresentation that Lanier & Associates would be the exclusive agent for the insurance program. Because this claim of fraud in the inducement of the agency contracts does not place in issue the making of the arbitration clauses themselves, count one is subject to arbitration under the FAA. *Shearson Lehman Brothers, Inc. v.*

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[8]Capitol Fire & Marine was the predecessor of Old Republic Union. See footnote 1.

Crisp, [Ms. 1910090, Aug. 14, 1992] ___ So.2d ___ (Ala. 1992); *Jones,* supra, 604 So.2d at 338. Therefore, the trial court erred when it refused to submit count one to arbitration. *See Jones,* 604 So.2d at 339-40.

Count three, alleging that Old Republic and Old Republic Union converted Lanier's clients and client information for their own use, "appears to raise issues largely distinct from the central conflict over the interpretation and performance of the [agreements themselves]." *Mediterranean Enterprises,* supra, 708 F.2d at 1465. Therefore, the trial court correctly refused to submit count three to arbitration.

For the foregoing reasons, the judgment of the circuit court is affirmed as to the conversion and interference with business relationships claim and reversed as to the fraud in the inducement claim, and the cause is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

Hornsby, C. J., and Almon, Houston, Steagall, Kennedy, Ingram, and Cook, JJ., concur.

Maddox, J., concurs in the result in part and dissents in part.

MADDOX, JUSTICE (concurring in the result, in part, and dissenting, in part).

The question of when and under what circumstances a dispute arises out of an agreement that involves interstate commerce and is therefore subject to the provisions of the Federal Arbitration Act ("FAA"), is one that courts have had difficulty resolving. There generally seems to be no "bright line" separating those disputes that arise out of such agreements from those that do not. This case provides no bright line.

The majority, applying what it describes as Alabama's strong public policy against arbitration, concludes that the subject agreement does not come within the terms of the FAA. My opinion of what constitutes a dispute arising out of an agreement involving interstate commerce and, therefore, coming within the provisions of the FAA, has been stated in other cases. See, *Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158 (Ala. 1983) (Maddox, J., dissenting); this Court's judgment in that case was vacated by the United States Supreme Court and the cause was remanded to this Court, *York International v. Alabama Oxygen Co.*, 465 U.S. 1016, 104 S. Ct. 1260, 79 L. Ed. 2d 668 (1984). See this Court's later opinion in *Ex parte Alabama Oxygen Co.*, 452 So. 2d 860 (Ala. 1984) (on remand from the United States Supreme Court), adopting my dissent in the original proceeding (433 So. 2d at 1168); and see *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala. 1986), which I joined.

Congress passed the FAA in 1925 out of a desire to overcome the common-law judicial hostility toward arbitration; Congress provided that agreements to arbitrate shall be "valid, irrevocable, and enforceable." 9 U.S.C. § 2 (1988). Section 2 of the FAA, overturning the judicial

presumption against agreements to arbitrate, applies to any "maritime transaction or . . . transaction involving commerce." In *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983), the Supreme Court of the United States stated that § 2 of the FAA stands for "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" and "creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Therefore, I am of the opinion that if the contract involved is one involving interstate commerce and the contract contains an arbitration agreement voluntarily entered into by the parties, federal policy favoring arbitration agreements must be applied, notwithstanding what the majority refers to as "our strong public policy against the use of predispute arbitration agreements." ___ So. 2d ___.

The Supreme Court of the United States stated in *Moses H. Cone Mem. Hospital,* 460 U.S. at 24-25, 103 S. Ct. at 941, 74 L. Ed. 2d at 785, that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Therefore, I cannot agree with the majority's interpretation of the language of the arbitration clauses to deny the benefits of the FAA to the party asserting entitlement to them. The Supreme Court has stated: "An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409, 1417 (1960). The language at issue in this case is "any dispute arising out of the Agreement shall be

submitted to the decision of a board of arbitration." The trial court narrowly construed this language on the basis of *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress, Int'l, Ltd.*, 803 F. Supp. 1358 (N.D. Ill. 1992), which was reversed by the Court of Appeals for the Seventh Circuit, 1 F.3d 639 (7th Cir. 1993). The language of the arbitration provision interpreted in *Sweet Dreams* was as follows: "Any dispute arising out of the agreement shall be settled and determined by [arbitration]." *Sweet Dreams*, 1 F.3d at 641. The district court held that the agreement to arbitrate was limited to matters involving contract interpretation or performance when it referred to controversies arising out of the contract. The Seventh Circuit said that "any dispute between contracting parties that is in any way connected with their contract could be said to 'arise out of' their agrement and thus be subject to arbitration under a provision employing this language." 1 F.3d at 642. Based upon this interpretation and the federal presumption in favor of arbitration, the Seventh Circuit concluded that the count alleging fraudulent inducement and count alleging intentional interference with business relationships where "related to the subject matter of the arbitration clause and subject to arbitration under it." *Id.* at 643. The provision at issue in this case specifically states that "any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration." Count one of Lanier's complaint basically alleges fraud in the inducement and count three alleges conversion and intentional interference with business relationships.

Based upon the Seventh Circuit's analysis of the Federal Arbitration Act in *Sweet Dreams,* which I find very persuasive, I conclude that the disputes in this case are subject to arbitration, because they clearly *"arise out of"* the agreement between the parties.

I recognize that Alabama does not have a strong public policy against arbitration, but I think that the majority's adoption of a standard of interpretation based upon the reasoning set forth in *Mediterranean Ent., Inc. v. Ssangyong,* 708 F.2d 1458 (9th Cir. 1983), which in turn relied upon I*n re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961), both of which denied arbitration, is too narrow in its scope.

The arbitration provision at issue in *Mediterranean Ent.* stated: "Any disputes arising hereunder . . . shall be settled through binding arbitration. . . ." 708 F.2d at 1461. The clause in *Kinoshita* required arbitration of "any dispute or difference [that] should arise under [the agreement]." 287 F.2d at 952. In this case, the arbitration provision, like the one in *Sweet Dreams,* applies to all disputes "arising out of" the agreement. The majority quotes Judge Medina's dicta in *Kinoshita* that suggest a synonymy between "arising under" and "arising out of." In *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.,* 745 F.2d 190 (2d Cir. 1984), the Court of Appeals for the Second Circuit re-examined *Kinoshita.* The Second Circuit concluded correctly, I believe, that *Kinoshita* is inconsistent with the federal policy favoring arbitration. 745 F.2d at 193-94. Rather than overrule *Kinoshita,* the *S.A. Mineracao* court "confine[d] *Kinoshita* to its precise facts." 745 F.2d at 194. As the Seventh Circuit in *Sweet Dreams* points out, "As a matter of 'precise fact,' *Kinoshita* deals with the effect of 'arising under' language." *Sweet Dreams,* 1 F.3d at 642. The arbitration clause in this case providing for arbitration of "any dispute arising out of" the contract is not within the "precise facts" of the clause in *Kinoshita,* providing for arbitration of "any dispute or difference [that] should arise under [the agreement". The clause in this case is clearly different from and broader than the clause in *Kinoshita.* The clause in this case bears a potentially broader reading than the clause

in *Mediterranean Ent.*, which provided for arbitration of "[a]ny disputes arising hereunder" and the clause in *Kinoshita*, which provided for arbitration of "any dispute or difference [that] should arise under [the agreement]". As the United States Supreme Court has stated, "[a]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptive of an interpretation that covers the asserted dispute." *United States Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1352-53, 4 L. Ed. 2d 1409, 1417 (1960). I believe that the majority's holding as to the claim alleging conversion and interference with business relationships is inconsistent with the federal policy favoring arbitration; therefore, I must respectfully dissent from that holding.

As to the majority's holding reversing the order of the trial court denying arbitration on the claim alleging fraud in the inducement, I concur in the result.

IN THE SUPREME COURT OF ALABAMA
March 2, 1001

Old Republic Insurance Company and Old Republic Union Insurance Company v. Tom Lanier, individually and d/b/a J.T. Lanier Agency (Montgomery Cir. Ct. No.: CV-92-2510)

ORDER

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

STUART, J. — Moore, C.J., and Houston, Lyons, Brown, Johnstone, Harwood, and Woodall, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 2nd day of March, 2001

/s/ Robert G. Esdale, Sr.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama